

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 22, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2766

Cir. Ct. No. 2012CV378

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN EX REL. MATTHEW TYLER,

PETITIONER-APPELLANT,

V.

**WAYNE WIEDENHOEFT, ACTING ADMINISTRATOR, DIVISION OF HEARINGS
AND APPEALS,**

RESPONDENT-RESPONDENT.

APPEAL from orders of the circuit court for Milwaukee County:
KEVIN E. MARTENS, Judge. *Affirmed.*

Before Blanchard, P.J., Higginbotham and Kloppenburg, JJ.

¶1 PER CURIAM. Matthew Tyler appeals an order affirming a decision of the Division of Hearings and Appeals revoking Tyler's extended supervision. He also appeals an order denying his motion for reconsideration. He argues that: (1) the Department of Corrections (DOC) lacked jurisdiction to

initiate revocation proceedings because Tyler had been committed to the Department of Health Services (DHS) under WIS. STAT. ch. 980 (2011-12)¹ and he was never released to the Department of Corrections; (2) he was not given sufficient notice that refusing to cooperate with treatment at the DHS facility could result in revocation of his extended supervision, particularly after he was informed of his right to refuse treatment under WIS. STAT. § 51.61; (3) the administrator acted arbitrarily in determining that the Department could revoke Tyler for refusing treatment; and (4) the court relied on inaccurate information in reaching its conclusion. We reject these arguments and affirm the orders.

¶2 In 2000, Tyler was convicted of sexual assault and was sentenced to twenty years' imprisonment, consisting of seven years' initial confinement and thirteen years' extended supervision. Conditions of his extended supervision included, "Continue counseling and other assessments to be determined. Sex offender group therapy." In 2008, Tyler signed a Rules of Community Supervision form setting out the terms of his release from prison. The form stated: "[I]n addition to any court-ordered conditions ... [y]ou shall make every effort to accept the opportunities and counseling offered by supervision." The form notified Tyler that his release could be revoked if he failed to comply with any of the conditions. Upon reaching his mandatory release date in 2008, Tyler was transferred on extended supervision to DHS facilities and was ultimately committed as a sexually violent person under WIS. STAT. § 980.06.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶3 At Sandridge Secure Treatment Center, a DHS facility, Tyler withdrew from assessment and refused to participate in treatment in 2011. On that basis, DOC sought revocation of Tyler’s extended supervision. The administrative law judge agreed, and revoked Tyler’s extended supervision. The administrator of the Division of Hearings and Appeals sustained that decision, holding that “regardless of [Tyler’s] transfer to a secure facility for treatment, he is a person on extended supervision and subject to revocation pursuant to WIS. STAT. § 304.06(3).”

¶4 Notwithstanding Tyler’s WIS. STAT. ch. 980 commitment, DOC had continuing jurisdiction to seek revocation of his extended supervision. An individual may be simultaneously committed under ch. 980 and incarcerated at a DOC facility. *State v. Gilbert*, 2012 WI 72, ¶28, 342 Wis. 2d 82, 816 N.W.2d 215, *cert. denied*, 133 S. Ct. 560 (2012). DOC and DHS have concurrent supervision over Tyler. Under WIS. STAT. § 304.06(3), every prisoner released to extended supervision remains in the legal custody of the Department of Corrections. DOC’s jurisdiction continues throughout the entire term of the sentence. Therefore, DOC had continuing jurisdiction to seek revocation of Tyler’s extended supervision regardless of his ch. 980 commitment. *State ex rel. McElvaney v. Schwarz*, 2008 WI App 102, ¶¶15-19, 313 Wis. 2d 125, 756 N.W.2d 441, *review denied*, 2008 WI 122, 314 Wis. 2d 70, 758 N.W.2d 91.

¶5 Citing *State ex rel. Woods v. Morgan*, 224 Wis. 2d 534, 591 N.W.2d 922 (Ct. App. 1999), Tyler argues that he was not on extended supervision because he was in the custody of DHS when he violated the terms of his extended supervision. In *Woods*, the offender was never released from DOC custody, and therefore was deemed not to be on parole. *Id.* at 535-40. Unlike in *Woods*, Tyler was no longer in the custody of any DOC institution when he

refused assessment at Sand Ridge. In *State ex rel. Riesch v. Schwarz*, 2005 WI 11, ¶¶19-23, 278 Wis. 2d 24, 692 N.W.2d 219, the court emphasized that *Woods* was limited to its facts, namely, the offender's retention in a DOC prison beyond his mandatory release date. Therefore, although Tyler was in custody at a DHS facility when he violated the terms of his extended supervision, he was released from confinement in a DOC facility and was therefore subject to revocation of his extended supervision.

¶6 Tyler had sufficient notice that his refusal to participate in assessment could result in revocation of his extended supervision. We reject Tyler's suggestion that he could violate the terms of his extended supervision if they were imposed so long ago that he cannot remember them. He cites no authority for the proposition that DOC was obligated to update him with reminders. Even so, he received such a reminder when he signed the Rules of Community Supervision in 2008, which expressly referred to the court-ordered conditions governing his extended supervision.

¶7 Tyler's argument that his right to refuse treatment under WIS. STAT. § 51.61 trumps the conditions of his extended supervision fails because that statute does not allow a WIS. STAT. ch. 980 patient to refuse *assessment*.²

¶8 We reject Tyler's argument that the administrator acted arbitrarily in determining that DOC could revoke his extended supervision for failing to participate in an assessment. Violation of any condition of extended supervision is sufficient ground for revocation. See *State ex rel. Warren v. Schwarz*, 211

² We express no opinion on the question of whether WIS. STAT. § 51.61 would affect a condition of extended supervision that required participation in *treatment*.

Wis. 2d 710, 724, 566 N.W.2d 173 (Ct. App. 1997). Tyler does not contest the fact that he refused to undergo an assessment.

¶9 Tyler's argument that information before the court was false or inaccurate is not properly before this court. As the circuit court noted in its order denying the motion for reconsideration, certiorari review is confined to the record and the court does not weigh the evidence or conduct a de novo review. *State ex rel. Conn. v. Board of Trustees of Wis. Ret. Fund*, 44 Wis. 2d 479, 482, 171 N.W.2d 418 (1969). Evidence that Tyler obtained almost one year after his revocation cannot be considered. In order to pursue a challenge based on a claim of newly discovered evidence, Tyler would be required to request the Division of Hearings and Appeals to reopen the revocation proceeding based on newly discovered evidence. *State ex rel. Booker v. Schwarz*, 2004 WI App 50, ¶15, 270 Wis. 2d 745, 678 N.W.2d 361. The initial determination regarding the significance of newly discovered evidence should be made by the Division. *Id.*

By the Court.—Orders affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

